No. 82-960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CITY DISPOSAL SYSTEMS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") submits this brief *amicus curiae* with the consent of the parties pursuant to this Court's rules.

INTEREST OF THE *AMICUS CURIAE*

The AFL-CIO is a federation of 99 national and international unions with a total membership of approximately 14 million working men and women. Virtually all of these

workers are covered by collective bargaining agreements between their union and their employer. The question presented here—whether "an individual employee's honest and reasonable assertion of a right that is provided for in a collective bargaining agreement is concerted activity protected by Section 7 of the National Labor Relations Act" (Pet. for Cert. at i)— is thus of moment to virtually every AFL-CIO union member.

INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental question posed in this case is to what extent the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("the NLRA" or "the Act") protects an effort by a worker to attempt to enforce the provisions of a collectively-bargained agreement. This question can arise if an individual is discharged for protesting an alleged breach of the agreement through the grievance procedure; for making an "informal" complaint to the employer over the employer's asserted noncompliance with the agreement; or, as in the instant case, for refusing to do that which the employee believes in good faith the agreement states the worker cannot be required to do. In each case, the threshold question is whether the individual has engaged in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" within the meaning of § 7 of the Act.

As the court below recognized, the National Labor Relations Board ("NLRB" or "the Board") has long held that "an individual enforcing rights under the labor contract is engaged in concerted activity . . . since the labor contract itself is the product of concerted activity and the action of the employee is an extension of that process," 683 F.2d 1005, 1007. This is commonly referred to as the "*Interboro* doctrine" because it first received judicial approval in *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2nd Cir.), *enf'g* 157 N.L.R.B. 1295 (1966). See also *Bunney Brothers Construction Co.*, 139 N.L.R.B.

1516, 1519 (1962). The court below rejected the *Interboro* doctrine, holding that in order for an assertion of rights under a collective agreement to constitute "concerted activit[y]" it "must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action * * *." 683 F.2d at 1007 quoting *Aro, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979). We show herein that the court below erred in so holding.

The term "concerted activity" is not self-defining, and the legislative history of the NLRA does not reveal that Congress focused on its precise meaning. Accordingly, the question of statutory construction presented by this case must be decided in light of "the provisions of the whole law, and . . . its object and policy," *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 285 (1956). Section 1 of the NLRA declares it to be the policy of the United States to eliminate obstructions to commerce "by encouraging the practice and procedure of collective bargaining." The Board's *Interborough* doctrine furthers that policy and accurately reflects the realities of labor relations when the rights of the parties are governed by a collective agreement.

"The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J.I. Case Co. v. Labor Board*, 321 U.S. 332, 338 (1944). Thus, when an individual employee asserts that "his" rights under the collective agreement have been violated, the employee actually is asserting a *collective* right—a right that "reflect[s] the strength and bargaining power . . . of the group"; a right that the individual enjoys only because he happens to be a member of a group that secured the right; and a right he shares in common with the group. The resolution of the individual's claim will necessarily determine the rights of all

members of the group because all members hold the same rights under the collective agreement. See, *e.g.*, *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 656 (1965); *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 700 (1966). Furthermore, since the Act seeks to further not only the negotiation of collective agreements but also the private resolution of disputes under those agreements, it would make no sense to hold that employees are protected by § 7 in negotiating a collective agreement but that they forfeit all protections in attempting to assert claims. As this Court reaffirmed in *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), a prior case involving the scope of "concerted activity" under § 7, "the Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life.'" *Id.* at 266, quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). It was error for the Court of Appeals to impose its own interpretation of § 7, since the Board's conclusion is consistent with the "object and policy" of the Act, and indeed any contrary conclusion would frustrate the Congressional design.

The foregoing analysis applies regardless of whether an employee seeks to enforce provisions of the collective agreement through a grievance, an "informal" protest, or, as here, through self-help, *i.e.*, by refusing to do that which the employee in good faith believes the agreement states he cannot be required to do. Regardless of the means chosen by the employee, he is in all events asserting a *collective* right and is associating himself with the other employees' concerted assertion of right—an assertion that takes the form of a collectively negotiated agreement rather than a collective show of force.

To be sure, there are important differences between an employee's voicing a complaint and an employee's refusing to comply with an employer's directive. But the dif-

ferences between the two categories of cases relate *not* to whether the activity is concerted, but rather to the countervailing interests of the employer that are implicated. Those interests are relevant in determining whether the activity is *protected*, a question that arises only after it is decided that the activity was concerted. That distinct issue is not presented by the instant case, since before the Board respondent asserted only that the activity was not concerted and did not argue that it was unprotected. See § 10(e) of the Act; *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982).

ARGUMENT

A. Section 7 of the NLRA grants employees a number of specifically delimited rights: "the right to self-organization, to form, join or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." In addition, § 7 grants employees one right which is stated in more general terms: the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This case concerns the scope of the latter right, for § 8(a)(1) of the Act declares it to be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in § 7."[1]

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[1] Because the Board, in its analysis in this case and in the line of cases on which the instant decision is based, asked whether the employee whose discharge was challenged under § 8(a)(1) was fired because he had engaged in concerted activity under § 7, we pose the issue here in like terms. At the outset, however, it is important to note that an employer may violate § 8(a)(1) without actually penalizing an employee for engaging in protected activity; conduct by the employer which *inhibits* the exercise of § 7 rights is likewise unlawful under § 8(a)(1). *See Labor Board v. Burnup & Sims*, 379 U.S. 21, 23-24 (1964); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-19 (1969); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). Thus even if an employee, in asserting a right under a collective agreement were not actually engaged in "concerted activity," a dis-

At the poles, determining what is and what is not "concerted activity" poses little difficulty. Thus, for example, if all workers at a place of business together present a petition to the employer they are engaged in "concerted activity"; if an individual alone seeks to negotiate an individual employment contract governing only his own employment he is not so engaged. As always, however, difficult problems are posed by cases between the extremes—for example, by a case in which an individual employee prepares a petition that he intends to submit to his fellows or an individual employee attempts to negotiate a contract for his fellows.

From the bare language of § 7, it is not self-evident where Congress intended to draw the line in extending protection only to "concerted activity." Nor is there anything in the legislative history of § 7 which, in terms, sets forth the understanding of the Congress that enacted the Wagner Act as to the meaning that Congress attached to the phrase "concerted activity."[2] Thus, here, as is often

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charge on account of the assertion of such a right might still violate § 8(a)(1) if the discharge were found to have an inhibiting effect on the exercise of § 7 rights.

Of course, "§ 7 does not protect all concerted activities." *Labor Board v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). Concluding that particular activity is "concerted" under § 7 therefore does not necessarily establish that the activity is protected. See pp. 15-16, *infra*.

[2] The "concerted activity" clause of § 7 was taken verbatim from § 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102, the section of that Act which declared "the public policy of the United States." *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 n.14 (1978). Congress first borrowed that clause in enacting § 7(a) of the National Industrial Recovery Act, 48 Stat. 198. As originally introduced by Senator Wagner, the NIRA provided that codes of fair competition should recognize the right of workers "to organize and bargain collectively through representatives of their own choosing" but did not contain any additional protection for "other concerted activities." During the hearings on the bill, William Green, President of the American Federation of Labor, proposed adding such language, noting that it was "a verbatim statement from the declared policy of the Govern-

true under the Act, interpreting the statutory language requires an inquiry into "the provisions of the whole law and . . . its object and policy." *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 285 (1956). The language "must be construed in light of the fact that it is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of the Congress to fashion a coherent national labor policy." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179-80 (1967).

There is no doubt as to the "object and policy" of the Wagner Act. Section 1 of that Act made the policy of the Act explicit:

> It is hereby declared to be the policy of the United States to eliminate the cause of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* . . .

Accordingly, as this Court has recognized, § 7 rights "are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'" *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 62 (1975), quoting § 1.

This understanding provides an important gloss on the words of § 7. In extending a right to engage in "con-

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ment as set forth in the Norris-LaGuardia anti-injunction law." *Hearings on H.R. 5664 Before the House Comm. on Ways and Means* at 117, 73rd Cong. 1st Sess. (1933). Green's suggestion was adopted without controversy by the House Committee, and ultimately by the Congress as a whole.

The Wagner Act legislative history in turn acknowledges the Norris-LaGuardia Act and the NIRA as the antecedents of § 7, but does not offer any explanation of the key phrase. *See, e.g.*, S. Rep. No. 573, 74th Cong., 1st Sess., at 9 (1933). The Taft-Hartley Act made no change in this language.

certed activities" § 7 plainly does not protect actions of an individual employee which are intended to establish or enforce an individual employment contract with the employer. Indeed, the very point of the national labor policy is that it "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.'" *Emporium*, *supra*, at 63, quoting *Allis-Chalmers*, *supra*, 388 U.S. at 180. But actions which look towards, or are part of, "the practice and procedure of collective bargaining" are precisely the type of actions the Act is designed to foster. Thus these actions are within § 7's reach.

B. 1. The Labor Board's *Interboro* doctrine is faithful to this policy. That doctrine rests on a very simple proposition, one that the Board articulated four years before *Interboro* in a case on which *Interboro* relied: "the implementation of [a collective bargaining] agreement by an employee is but an extension of the concerted activity giving rise to that agreement," *Bunney Brothers Construction Co.*, 139 N.L.R.B. 1516, 1519 (1962). This proposition in turn reflects the realities of labor relations under the NLRA.[3]

When workers join together, form a labor union, and engage in collective bargaining, they fundamentally

[3] In recent years, the Board has extended the *Interboro* doctrine by holding that an individual who invokes a statutory right or who makes a complaint *not* grounded in a collective agreement is nonetheless engaged in a "concerted activit[y]" if the matter he raises is of consequence to others. *E.g.*, *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975). A number of appellate courts, while endorsing *Interboro*, have disapproved of this extension of the *Interboro* doctrine. *See, e.g.*, *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2nd Cir. 1980); *NLRB v. Town & Country LP Gas Service Co.*, 687 F.2d 187, 191 (7th Cir. 1982); *NLRB v. C&I Air Conditioning Inc.*, 486 F.2d 977 (9th Cir. 1973). Because the validity of this extension of *Interboro* is not raised by the instant case, we do not consider it herein.

transform the nature of the employment relationship from an individual to a collective one. "The very purpose of providing by statute for the collective agreement is to supersede the terms of the separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co. v. Labor Board*, 321 U.S. 332, 338 (1944). A collective agreement does not secure rights to any individual as such: "no one has a job by reason of [a collective agreement] and no obligation to any individual ordinarily comes into existence from it alone." *Id.* at 335. But any person whom the employer happens to hire into the unit covered by the agreement "becomes entitled . . . somewhat as a third party beneficiary to all benefits of the collective trade agreement." *Id.* at 336. "Its benefits and advantages are open to every employee of the represented unit." *Id.* at 338.

Thus, when an individual employee alleges that "his" rights under the collective agreement have been violated, the employee actually is asserting a *collective* right—a right that "reflect[s] the strength and bargaining power . . . of the group"; a right that the individual enjoys only because he happens to be a member of a group that secured the right; and a right he shares in common with the group. The resolution of the individual's claim will necessarily determine the rights of all members of the group because all members hold the same rights under the collective agreement. Thus, the individual's claim is, in effect, a claim of the group. "Individual claims which lie at the heart of the grievance and arbitration machinery are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based." *Smith v. Evening*

News Ass'n, 371 U.S. 195, 200 (1962). See also *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 700 (1967).

Because claims under collective agreements are claims of a collective right, the means for resolving such claims is through collective (*i.e.*, concerted) action. Specifically, collective agreements typically contain a grievance-arbitration procedure which provides the exclusive means for resolving any dispute under the agreement. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). In the grievance procedure, the employer faces his employees as a group. The group—the union—decides whether to settle or prosecute a particular grievance, *see Vaca v. Sipes*, 386 U.S. 171 (1967), and "as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.9 (1974). Indeed, "the grievance-arbitration procedure forms an integral part of the collective bargaining process," *Metropolitan Edison Co. v. NLRB*, —— U.S. ——, 51 U.S.L.W. 4350, 4354 (April 4, 1983), a process that is "continuing", *Conley v. Gibson*, 355 U.S. 41, 46 (1957).[4]

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[4] The Court said in *Conley*:

> Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. [355 U.S. at 46.]

The very point of *Conley* (which arose under the Railway Labor Act) and of like cases under the NLRA is that because the power to control enforcement of the collective agreement through the grievance procedure is fixed (unless the agreement otherwise provides) exclusively in the bargaining representative, the union owes a duty of fair representation to the employee in handling the grievance. See, *e.g.*, *Vaca v. Sipes*, *supra*; *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

The interrelationship between an individual complaint under a collective agreement and the continuing process of collective bargaining is most obvious when the individual presents his claim in such a manner as to satisfy the first step in the grievance procedure and thereby formally triggers that procedure. But there is seldom a bright line to separate "grievances" from "complaints." Under the typical agreement, any dispute as to the meaning or application of a collective agreement can be processed through the grievance machinery. And many collective bargaining agreements provide that the first step in the grievance procedure is for the affected employee to meet with his supervisor to attempt to resolve the dispute;[5] thus, what may to an outsider appear to be only an employee's gripe, will often be an effort, however inartful, to initiate the grievance process.

In any event, as a practical matter, for a rank-and-file employee "unsophisticated in collective bargaining matters," cf. *DelCostello v. Teamsters*, No. 81-2386 (U.S., June 8, 1983) slip op. p. 11, a complaint to "the boss" is often the predicate to the submission of a formal grievance. Moreover, to limit § 7 protection to those complaints that are presented in such a matter as to legally qualify as part of the grievance procedure would transform such procedures into technical rules of pleading—rules that would trap many an unwary rank-and-file worker. "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Cf. *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). Thus in *Interboro* the Board wisely concluded that all contract complaints should be viewed as "grievances within the framework of the contract" for purposes of § 7. 157 N.L.R.B. at 1298.

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[5] See, *e.g.*, *Republic Steel Co. v. Maddox*, 379 U.S. 650, 658 (1965).

In sum, when an individual alleges a violation of a right secured by a collective agreement, the individual is attempting to vindicate a right that was secured by the group, that belongs to the group, and that is enforced through the group. Thus, in concluding that the assertion of a claim under a collective agreement is not an island of individual activity but rather is part of the whole continent of concerted activity in which the employees, through their union, are continuously engaged, the Board was merely "adopt[ing] the Act to changing patterns of industrial life." *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). This, of course, is precisely the "responsibility" that is "entrusted to the Board." *Id.*

2. Indeed, had the Board reached any other conclusion it would have flouted the "object and policy" (p. 7, *supra*) of the NLRA. That Act, after all, seeks to further both the negotiation of collective agreements and the private resolution of disputes under those agreements.[6] NLRA, § 8(d); LMRA, § 203(d). It would be ironic, indeed, if employees were held to be protected by § 7 in negotiating a collective agreement and a mechanism for resolving disputes under that agreement, but were not protected in asserting claims under that agreement or in attempting, however clumsily, to submit disputes to the grievance machinery. Such a holding would disparage the grievance procedure and ultimately the collective bargaining process itself. Thus, the *Interboro* doctrine, by viewing the presentation of claims under a collective agreement as an extension of the concerted activities involved in creating the agreement, advances the objectives of the NLRA.

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[6] The Act disfavors the making of individual employment contracts, see *J.I. Case, supra*, 321 U.S. at 338, and thus an individual employee's efforts to secure such an individual agreement or to enforce rights thereunder are not, ordinarily, "concerted" activities.

3. The court below nonetheless concluded that the *Interboro* doctrine is foreclosed by "the plain language of Section 7." 683 F.2d at 1007. The court stated:

> Section 7 requires that the employee engage in 'concerted activities.' An individual does not act in concert with himself. [*Id.*]

This reasoning misses the entire point of the Act.

What the Board concluded in *Interboro* is that in making a claim under a collective agreement the individual's action is not disassociated from the concerted activity of collective bargaining. *Interboro* thus rests on the Board's determination that a close nexus exists between the individual complaint and the ongoing concerted activity of negotiating, administering and enforcing the collective agreement. And nothing in the "plain language" of § 7 precludes a finding of "concerted activity" based on such a nexus. Indeed, the lower court itself concluded that a claim submitted by a single individual can constitute "concerted activity" if "made with the object of inducing or preparing for group action." 683 F.2d at 1007.

In sum, *Interboro* accords with the realities of industrial relations and the policies of the Act. It is, therefore, at the very least a "defensible" construction of the statute and, as such, is "entitled to considerable deference." *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1971). This Court has recognized that the task of "delineat[ing] precisely the boundaries of the '[concerted activities . . . for] mutual aid or protection clause' . . . is for the Board to perform in the first instance as it considers the wide variety of cases that come before it." *Eastex, Inc. v. NLRB*, *supra*, 437 U.S. at 568. *See also Weingarten*, *supra*, 420 U.S. at 266-67.

C. 1. We have focused thus far on the application of *Interboro* in its traditional context, *i.e.*, to the assertion of a claim under a collective agreement. In this case, of course, the discharged employee, James Brown, did more than merely allege a breach of the collective agreement.

Brown refused to drive a particular truck to which he was assigned on the ground that the truck had defective brakes and had been so reported by a fellow employee. In refusing to drive, Brown was exercising a right—indeed, two rights—stated in the collective bargaining agreement.[7] Accordingly, under the principles previously discussed, his activity was *concerted* whether or not his refusal was *protected*, which, as noted at p. 6, n.1, *supra*, is a distinct issue.

It appears from the collective agreement that respondent's employees had concertedly decided not to drive unsafe trucks, and to support each other in refusing to do so. Instead of reenacting their concerted determination not to drive an unsafe truck each time an employee was directed to do so, the employees collectively negotiated for all members of the group the contractual right to refuse to do so. That agreement, in effect, is a proxy for concerted shows of force: each time an employee refuses

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[7] Article XXI, § 1 of the Agreement, provided:

> The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

The Administrative Law Judge expressly found that Brown's "complaint . . . regarding truck 244's brakes was warranted" in light of the fact that the employee had observed the brakes malfunction two days earlier (Pet. App. 19a).

In addition to § 1, Article XXI § 4, provided:

> The Employer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical department.

As the ALJ found, truck 244 had been reported to be unsafe by another employee two days earlier and there is no evidence that during the ensuing weekend the truck was approved as safe by the mechanical department; thus, it apears that Brown had a right to refuse to drive the truck under this latter section as well.

to drive an unsafe truck, he clothes himself in the concerted determination of the group, and the group is behind the employee. And Brown's refusal to work is an assertion of that right, which belongs to each member of the group as such.[8] At a minimum, Brown's refusal to drive Truck 244 was "an individual employee's honest and reasonable assertion of a right that is provided in a collective bargaining agreement." Pet. for Cert. at i. It would be contrary to the policies and objectives of the Act to require an employee to instigate a showing of group support in order to meet § 7's concertedness requirement.[9]

In short, there is no analytically sound distinction between cases involving protests over the alleged breach of a collectively-bargained right and cases involving the good-faith exercise of such a right. The Board, therefore, has properly applied its *Interboro* doctrine to the latter category of cases.

2. To be sure, there are obvious common-sense differences between an employee's articulating a complaint and an employee's noncompliance with an employer's command. Those differences relate to the countervailing interests of the employer that are implicated, and *not* to whether the activity is concerted. They therefore bear on whether the activity is *protected*, but are not pertinent to the threshold issue whether the activity is *concerted*.

A work stoppage is unprotected if it is in breach of the collective agreement, see, *e.g.*, *Mastro Plastics Corp.*,

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[8] Of course, the fact that Brown's discharge may have violated the agreement did not deprive him of a remedy under the NLRA. See *NLRB v. Strong*, 393 U.S. 357, 360 (1969) and cases cited *id.*

[9] If the discharged employee and the employee who was regularly assigned to drive truck 244 had both refused to drive the truck in its then-existing condition—or, if all employees had refused to work in support of Brown—plainly their activities would have been "concerted."

supra, 350 U.S. at 280, n.10, unless the breach is excused, see, *e.g.*, *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 385 (1974) (discussing § 502 of the Labor Management Relations Act of 1947, 29 U.S.C. § 143). In the present case, this Court need not and should not consider whether the employee's refusal to drive truck 244 was protected, because the employer made no contention before the Board that the employee's refusal was unprotected. Accordingly, the employer is barred by § 10(e) of the Act from obtaining judicial review of the Board's decision on that ground, as this Court recently reiterated in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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